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(7) Fails to ensure authorized users comply with their QE DUAs or analysis use agreements.

(b) *Return or destruction of CMS data upon voluntary or involuntary termination from the qualified entity program:*

(1) If CMS terminates a qualified entity's agreement, the qualified entity and its contractors must immediately upon receipt of notification of the termination commence returning or destroying any and all CMS data (and any derivative files). In no instance can this process exceed 30 days.

(2) If a qualified entity voluntarily terminates participation under this subpart, it and its contractors must return to CMS, or destroy, any and all CMS data in its possession within 30 days of notifying CMS of its intent to end its participation.

[76 FR 76567, Dec. 7, 2011, as amended at 81 FR 44482, July 7, 2016]

§ 401.722 Qualified clinical data registries.

(a) A qualified clinical data registry that agrees to meet all the requirements in this subpart, with the exception of § 401.707(d), may request access to Medicare data as a quasi qualified entity in accordance with such qualified entity program requirements.

(b) Notwithstanding § 401.703(q) (generally defining combined data), for purposes of qualified clinical data registries acting as quasi qualified entities under the qualified entity program requirements, combined data means, at a minimum, a set of CMS claims data provided under this subpart combined with clinical data or a subset of clinical data.

[81 FR 44482, July 7, 2016]

PART 402—CIVIL MONEY PENALTIES, ASSESSMENTS, AND EXCLUSIONS

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AUTHORITY: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

SOURCE: 63 FR 68690, Dec. 14, 1998, unless otherwise noted.

Subpart A—General Provisions

§ 402.1 Basis and scope.

(a) *Basis.* This part is based on the sections of the Act that are specified in paragraph (c) of this section.

(b) *Scope.* This part—

(1) Provides for the imposition of civil money penalties, assessments, and exclusions against persons that violate the provisions of the Act specified in paragraph (c), (d), or (e) of this section; and

(2) Sets forth the appeal rights of persons subject to penalties, assessments, or exclusion and the procedures for reinstatement following exclusion.

(c) *Civil money penalties.* CMS or OIG may impose civil money penalties

against any person or other entity specified in paragraphs (c)(1) through (c)(34) of this section under the identified section of the Act. (The authorities that also permit imposition of an assessment or exclusion are noted in the applicable paragraphs.)

(1) Sections 1833(h)(5)(D) and 1842(j)(2)—Any person that knowingly and willfully, and on a repeated basis, bills for a clinical diagnostic laboratory test, other than on an assignment-related basis. This provision includes tests performed in a physician's office but excludes tests performed in a rural health clinic. (This violation may also include an assessment and cause exclusion.)

(2) Section 1833(i)(6)—Any person that knowingly and willfully presents, or causes to be presented, a bill or request for payment for an intraocular lens inserted during or after cataract surgery for which the Medicare payment rate includes the cost of acquiring the class of lens involved.

(3) Section 1833(q)(2)(B)—Any entity that knowingly and willfully fails to provide information about a referring physician, including the physician's name and unique physician identification number for the referring physician, when seeking payment on an unassigned basis. (This violation, if it occurs in repeated cases, may also cause an exclusion.)

(4) Sections 1834(a)(11)(A) and 1842(j)(2)—Any durable medical equipment supplier that knowingly and willfully charges for a covered service that is furnished on a rental basis after the rental payments may no longer be made (except for maintenance and servicing) as provided in section 1834(a)(7)(A). (This violation may also include an assessment and cause exclusion.)

(5) Sections 1834(a)(18)(B) and 1842(j)(2)—Any nonparticipating durable medical equipment supplier that knowingly and willfully, in violation of section 1834(a)(18)(A), fails to make a refund to Medicare beneficiaries for a covered service for which payment is precluded due to an unsolicited telephone contact from the supplier. (This violation may also include an assessment and cause exclusion.)

(6) Sections 1834(b)(5)(C) and 1842(j)(2)—Any nonparticipating physician or supplier that knowingly and willfully charges a Medicare beneficiary more than the limiting charge, as specified in section 1834(b)(5)(B), for radiologist services. (This violation may also include an assessment and cause exclusion.)

(7) Sections 1834(c)(4)(C) and 1842(j)(2)—Any nonparticipating physician or supplier that knowingly and willfully charges a Medicare beneficiary more than the limiting charge, as specified in section 1834(c)(4)(B), for mammography screening. (This violation may also include an assessment and cause exclusion.)

(8) Sections 1834(h)(3) and 1842(j)(2)—Any supplier of prosthetic devices, orthotics, and prosthetics that knowingly and willfully charges for a covered prosthetic device, orthotic, or prosthetic that is furnished on a rental basis after the rental payment may no longer be made (except for maintenance and servicing). (This violation may also include an assessment and cause exclusion.)

(9) Section 1834(j)(2)(A)(iii)—Any supplier of durable medical equipment, including a supplier of prosthetic devices, prosthetics, orthotics, or supplies, that knowingly and willfully distributes a certificate of medical necessity in violation of section 1834(j)(2)(A)(i) or fails to provide the information required under section 1834(j)(2)(A)(ii).

(10) Sections 1834(j)(4) and 1842(j)(2)—

(i) Any supplier of durable medical equipment, including a supplier of prosthetic devices, prosthetics, orthotics, or supplies, that knowingly and willfully fails to make refunds in a timely manner to Medicare beneficiaries for services billed other than on an assignment-related basis if—

(A) The supplier does not possess a Medicare supplier number;

(B) The service is denied in advance under section 1834(a)(15); or

(C) The service is determined not to be medically necessary or reasonable.

(ii) These violations may also include an assessment and cause exclusion.

(11) Sections 1842(b)(18)(B) and 1842(j)(2)—Any practitioner specified in

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section 1842(b)(18)(C) (physician assistants, nurse practitioners, clinical nurse specialists, certified registered nurse anesthetists, certified nurse-midwives, clinical social workers, and clinical psychologists) or other person that knowingly and willfully bills or collects for any services by the practitioners on other than an assignment-related basis. (This violation may also include an assessment and cause exclusion.)

(12) Sections 1842(k) and 1842(j)(2)—Any physician who knowingly and willfully presents, or causes to be presented, a claim or bill for an assistant at cataract surgery performed on or after March 1, 1987 for which payment may not be made because of section 1862(a)(15). (This violation may also include an assessment and cause exclusion.)

(13) Sections 1842(l)(3) and 1842(j)(2)—Any nonparticipating physician who does not accept payment on an assignment-related basis and who knowingly and willfully fails to refund on a timely basis any amounts collected for services that are not reasonable or medically necessary or are of poor quality, in accordance with section 1842(l)(1)(A). (This violation may also include an assessment and cause exclusion.)

(14) Sections 1842(m)(3) and 1842(j)(2)—(i) Any nonparticipating physician, who does not accept payment for an elective surgical procedure on an assignment-related basis and whose charge is at least \$500, who knowingly and willfully fails to—

(A) Disclose the information required by section 1842(m)(1) concerning charges and coinsurance amounts; and

(B) Refund on a timely basis any amount collected for the procedure in excess of the charges recognized and approved by the Medicare program.

(ii) This violation may also include an assessment and cause exclusion.

(15) Sections 1842(n)(3) and 1842(j)(2)—Any physician who knowingly and willfully, in repeated cases, bills one or more beneficiaries, for purchased diagnostic tests, any amount other than the payment amount specified in section 1842(n)(1)(A) or section 1842(n)(1)(B). (This violation may also include an assessment and cause exclusion.)

(16) Section 1842(p)(3)(A)—Any physician or practitioner who knowingly and willfully fails promptly to provide the appropriate diagnosis code or codes upon request by CMS or a carrier on any request for payment or bill not submitted on an assignment-related basis for any service furnished by the physician. (This violation, if it occurs in repeated cases, may also cause exclusion.)

(17) Sections 1848(g)(1)(B) and 1842(j)(2)—

(i) Any nonparticipating physician, supplier, or other person that furnishes physicians' services and does not accept payment on an assignment-related basis, that—

(A) Knowingly and willfully bills or collects in excess of the limiting charge (as defined in section 1848(g)(2)) on a repeated basis; or

(B) Fails to make an adjustment or refund on a timely basis as required by section 1848(g)(1)(A)(iii) or (iv).

(ii) These violations may also include an assessment and cause exclusion.

(18) Section 1848(g)(3)(B) and 1842(j)(2)—Any person that knowingly and willfully bills for State plan approved physicians' services, as defined in section 1848(j)(3), on other than an assignment-related basis for a Medicare beneficiary who is also eligible for Medicaid (these individuals include qualified Medicare beneficiaries). This provision applies to services furnished on or after April 1, 1990. (This violation may also include an assessment and cause exclusion.)

(19) Section 1848(g)(4)(B)(ii), 1842(p)(3), and 1842(j)(2)(A)—

(i) Any physician, supplier, or other person (except any person that has been excluded from the Medicare program) that, for services furnished after September 1, 1990, knowingly and willfully—

(A) Fails to submit a claim on a standard claim form for services provided for which payment is made under Part B on a reasonable charge or fee schedule basis; or

(B) Imposes a charge for completing and submitting the standard claims form.

(ii) These violations, if they occur in repeated cases, may also cause exclusion.

(20) Section 1862(b)(5)(C)—Any employer (other than a Federal or other governmental agency) that, before October 1, 1998, willfully or repeatedly fails to provide timely and accurate information requested relating to an employee's group health insurance coverage.

(21) Section 1862(b)(6)(B)—Any entity that knowingly, willfully, and repeatedly—

(i) Fails to complete a claim form relating to the availability of other health benefit plans in accordance with section 1862(b)(6)(A); or

(ii) Provides inaccurate information relating to the availability of other health benefit plans on the claim form.

(22) Section 1877(g)(5)—Any person that fails to report information required by HHS under section 1877(f) concerning ownership, investment, and compensation arrangements. (This violation may also include an assessment and cause exclusion.)

(23) Sections 1879(h), 1834(a)(18), and 1842(j)(2)—

(i) Any durable medical equipment supplier, including a supplier of prosthetic devices, prosthetics, orthotics, or supplies, that knowingly and willfully fails to make refunds in a timely manner to Medicare beneficiaries for services billed on an assignment-related basis if—

(A) The supplier did not possess a Medicare supplier number;

(B) The service is denied in advance under section 1834(a)(15) of the Act; or

(C) The service is determined not to be payable under section 1834(a)(17)(b) because of unsolicited telephone contacts.

(ii) These violations may also include an assessment and cause exclusion.

(24) Section 1882(a)(2)—Any person that issues a Medicare supplemental policy that has not been approved by the State regulatory program or does not meet Federal standards on and after the effective date in section 1882(p)(1)(C). (This violation may also include an assessment and cause exclusion.)

(25) Section 1882(p)(8)—Any person that sells or issues Medicare supplemental policies, on or after July 30, 1992, that fail to conform to the NAIC or Federal standards established under

section 1882(p). (This violation may also include an assessment and cause exclusion.)

(26) Section 1882(p)(9)(C)—

(i) Any person that sells a Medicare supplemental policy and—

(A) Fails to make available for sale the core group of basic benefits when selling other Medicare supplemental policies with additional benefits; or

(B) Fails to provide the individual, before the sale of the policy, an outline of coverage describing the benefits provided by the policy.

(ii) These violations may also include an assessment and cause exclusion.

(27) Section 1882(q)(5)(C)—

(i) Any person that fails to—

(A) Suspend a Medicare supplemental policy at the policyholder's request, if the policyholder applies for and is determined eligible for medical assistance, and the policyholder provides notice within 90 days of the eligibility determination; or

(B) Automatically reinstate the policy as of the date of termination of medical assistance if the policyholder loses eligibility for medical assistance and the policyholder provides notice within 90 days of loss of eligibility.

(ii) These violations may also include an assessment and cause exclusion.

(28) Section 1882(r)(6)(A)—Any person that fails to provide refunds or credits as required by section 1882(r)(1)(B). (This violation may also include an assessment and cause exclusion.)

(29) Section 1882(s)(4)—

(i) Any issuer of a Medicare supplemental policy that—

(A) Does not waive any time periods applicable to preexisting conditions, waiting periods, elimination periods, or probationary periods if the time periods were already satisfied under a preceding Medicare supplemental policy; or

(B) Denies a policy, conditions the issuance or effectiveness of the policy, or discriminates in the pricing of the policy based on health status or other criteria as specified in section 1882(s)(2)(A).

(ii) These violations may also include an assessment and cause exclusion.

(30) Section 1882(t)(2)—

(i) Any issuer of a Medicare supplemental policy that—

(A) Fails substantially to provide medically necessary services to enrollees seeking the services through the issuer's network of entities;

(B) Imposes premiums on enrollees in excess of the premiums approved by the State;

(C) Acts to expel an enrollee for reasons other than nonpayment of premiums; or

(D) Does not provide each enrollee at the time of enrollment with the specific information provided in section 1882(t)(1)(E)(i) or fails to obtain a written acknowledgment from the enrollee of receipt of the information (as required by section 1882(t)(1)(E)(ii)).

(ii) These violations may also include an assessment and cause exclusion.

(31) Sections 1834(k)(6) and 1842(j)(2)—Any person or entity who knowingly and willfully bills or collects for any outpatient therapy services or comprehensive outpatient rehabilitation services on other than an assignment-related basis. (This violation may also include an assessment and cause exclusion.)

(32) Sections 1834(l)(6) and 1842(j)(2)—Any supplier of ambulance services who knowingly and willfully bills or collects for any services on other than an assignment-related basis. (This violation may also include an assessment and cause exclusion.)

(33) Section 1806(b)(2)(B)—Any person who knowingly and willfully fails to furnish a beneficiary with an itemized statement of items or services within 30 days of the beneficiary's request.

(34) Section 1128G (b) (1) and (2)—Any applicable manufacturer or applicable group purchasing organization that fails to timely, accurately, or completely report a payment or other transfer of value or an ownership or investment interest to CMS, as required under part 403, subpart I, of this chapter.

(d) *Assessments.* CMS or OIG may impose assessments in addition to civil money penalties for violations of the following statutory sections:

(1) Section 1833: Paragraph (h)(5)(D).

(2) Section 1834: Paragraphs (a)(11)(A), (a)(18)(B), (b)(5)(C), (c)(4)(C), (h)(3), (j)(4), (k)(6), and (l)(6).

(3) Section 1842: Paragraphs (k), (l)(3), (m)(3), and (n)(3).

(4) Section 1848: Paragraph (g)(1)(B).

(5) Section 1877: Paragraph (g)(5).

(6) Section 1879: Paragraph (h).

(7) Section 1882: Paragraphs (a)(2), (p)(8), (p)(9)(C), (q)(5)(C), (r)(6)(A), (s)(3), and (t)(2).

(e) *Exclusions.* (1) CMS or OIG may exclude any person from participation in the Medicare program on the basis of any of the following violations of the statute:

(i) Section 1833: Paragraphs (h)(5)(D) and, in repeated cases, (q)(2)(B).

(ii) Section 1834: Paragraphs (a)(11)(A), (a)(18)(B), (b)(5)(C), (c)(4)(C), (h)(3), (j)(4), (k)(6), and (l)(6).

(iii) Section 1842: Paragraphs (b)(18)(B), (k), (l)(3), (m)(3), (n)(3), and, in repeated cases, (p)(3)(B).

(iv) Section 1848: Paragraphs (g)(1)(B), (g)(3)(B), and, in repeated cases, (g)(4)(B)(ii).

(v) Section 1877: Paragraph (g)(5).

(vi) Section 1879: Paragraph (h).

(vii) Section 1882: Paragraphs (a)(2), (p)(8), (p)(9)(C), (q)(5)(C), (r)(6)(A), (s)(4), and (t)(2).

(2) CMS or OIG must exclude from participation in the Medicare program any of the following, under the identified section of the Act:

(i) Section 1834(a)(17)(C)—Any supplier of durable medical equipment and supplies that are covered under section 1834(a)(13) that knowingly contacts Medicare beneficiaries by telephone regarding the furnishing of covered services in violation of section 1834(a)(17)(A) and whose conduct establishes a pattern of prohibited contacts as described under section 1834(a)(17)(A).

(ii) Section 1834(h)(3)—Any supplier of prosthetic devices, orthotics, and prosthetics that knowingly contacts Medicare beneficiaries by telephone regarding the furnishing of prosthetic devices, orthotics, or prosthetics in the same manner as in the violation under section 1834(a)(17)(A) and whose conduct establishes a pattern of prohibited contacts in the same manner as described in section 1834(a)(17)(C).

(f) *Responsible persons.* (1) If CMS or OIG determines that more than one person is responsible for any of the violations described in paragraph (c) or paragraph (d) of this section, it may impose a civil money penalty or a civil

money penalty and assessment against any one of those persons or jointly and severally against two or more of those persons. However, the aggregate amount of the assessments collected may not exceed the amount that could be assessed if only one person were responsible.

(2) A principal is liable for penalties and assessments for the actions of his or her agent acting within the scope of the agency.

(g) *Time limits.* Neither CMS nor OIG initiates an action to impose a civil money penalty, assessment, or proceeding to exclude a person from participation in the Medicare program unless it begins the action within 6 years from the date on which the claim was presented, the request for payment was made, or the incident occurred.

[63 FR 68690, Dec. 14, 1998, as amended at 66 FR 49546, Sept. 28, 2001; 78 FR 9520, Feb. 8, 2013]

§ 402.3 Definitions.

For purposes of this part:

Assessment means the amount described in § 402.107 and includes the plural of that term.

Assignment-related basis means that the claim submitted by a physician, supplier or other person is paid on the basis of an assignment, whereby the physician, supplier or other person agrees to accept the Medicare payment as payment in full for the services furnished to the beneficiary and is precluded from charging the beneficiary more than the deductible and coinsurance based upon the approved Medicare fee amount. Additional obligations, including obligations to make refunds in certain circumstances, are established at section 1842(b)(3) of the Act.

Claim means an application for payment for a service for which the Medicare or Medicaid program may pay.

Covered means that a service is described as reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member. A service is not covered if it is specifically identified as excluded from Medicare Part B coverage or is not a defined Medicare Part B benefit.

Exclusion means the temporary or permanent barring of a person or other

entity from participation in the Medicare or State health care program and that services furnished or ordered by that person are not paid for under either program.

General Counsel means the General Counsel of HHS or his or her designees.

Initiating agency means whichever agency (CMS or the OIG) initiates the interaction with the person.

Knowingly or knowingly and willfully means that a person, with respect to information—

(1) Has actual knowledge of the information;

(2) Acts in deliberate ignorance of the truth or falsity of the information; or

(3) Acts in reckless disregard of the truth or falsity of the information; and

(4) No proof of specific intent is required.

Medicare supplemental policy means a policy guaranteeing that a health plan will pay a policyholder's coinsurance and deductible and will cover other limitations on payment imposed under title XVIII of the Act and will provide additional health plan or non-Medicare coverage for services up to a predefined benefit limit.

NAIC stands for the National Association of Insurance Commissioners.

Nonparticipating describes a physician, supplier, or other person (excluding any provider of services) that, at the time of furnishing the services to Medicare Part B beneficiaries, is not a participating physician or supplier.

Participating describes a physician or supplier (excluding any provider of services) that, before the beginning of any given year, enters into an agreement with HHS that provides that the physician or supplier will accept payment under the Medicare program on an assignment-related basis for all services furnished to Medicare Part B beneficiaries.

Penalty means the amount described in § 402.105 and includes the plural of that term.

Person means an individual, trust or estate, partnership, corporation, professional association or corporation, or other entity, public or private.

Physicians' services means the following Medicare covered professional services:

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(1) Surgery, consultation, home, office and institutional calls, and other professional services performed by physicians.

(2) Services and supplies furnished “incident to” a physician’s professional services.

(3) Outpatient physical and occupational therapy services.

(4) Diagnostic x-ray tests and other diagnostic tests (excluding clinical diagnostic laboratory tests).

(5) X-ray, radium, and radioactive isotope therapy, including materials and services of technicians.

(6) Antigens prepared by a physician.

Radiologist service means radiology services performed only by, or under the direction of, a physician who is certified, or eligible to be certified, by the American Board of Radiology or for whom radiology services account for at least 50 percent of the total amount of charges made under part B of title XVIII of the Act.

Request for payment means an application submitted by a person to any person for payment for a service.

Respondent means the person upon which CMS or OIG has imposed, or proposes to impose, a civil money penalty, assessment, or exclusion.

Service includes—

(1) Any item, device, medical supply, or service claimed to have been furnished to a patient and listed in an itemized claim for program payment; or

(2) In the case of a claim based on costs, any entry or omission in a cost report, books of account or other documents supporting the claim.

State includes the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

Timely basis means that the adjustment to a bill or a refund is considered “on a timely basis” if the physician, supplier, or other person makes the adjustment or refund to the appropriate party no later than 30 days after the date the physician, supplier, or other person is notified by the Medicare Part B contractor of the violation and the

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requirement to refund any excess collections.

[63 FR 68690, Dec. 14, 1998, as amended at 72 FR 39752, July 20, 2007]

§ 402.5 Right to a hearing before the final determination.

CMS or OIG does not make a determination adverse to any person under this part until the person has been given a written notice and opportunity for the determination to be made on the record after a hearing at which the person is entitled to be represented by counsel, to present witnesses, and to cross-examine witnesses against the person.

§ 402.7 Notice of proposed determination.

(a) If CMS or OIG proposes a penalty and, as applicable, an assessment, or proposes to exclude a respondent from participation in Medicare in accordance with this part, it sends the respondent written notice of its intent by certified mail, return receipt requested. The notice includes the following information:

(1) Reference to the statutory basis or bases for the penalty, assessment, exclusion, or any combination, as applicable.

(2)(i) A description of the claims, requests for payment, or incidents with respect to which the penalty, assessment, and exclusion are proposed; or

(ii) If CMS or OIG is relying upon statistical sampling to project the number and types of claims or requests for payment and the dollar amount, a description of the claims and requests for payment comprising the sample and a brief description of the statistical sampling technique CMS or OIG used.

(3) The reason why the claims, requests for payment, or incidents are subject to a penalty and assessment.

(4) The amount of the proposed penalty and of any proposed assessment.

(5) Any mitigating or aggravating circumstances that CMS or OIG considered when it determined the amount of the proposed penalty and any applicable assessment.

(6) Information concerning response to the notice, including—

(i) A specific statement of the respondent’s right to a hearing; and

(ii) A statement that failure to request a hearing within 60 days renders the proposed determination final and permits the imposition of the proposed penalty and any assessment.

(iii) A statement that the debt may be collected through an administrative offset.

(7) In the case of a respondent that has an agreement under section 1866 of the Act, notice that imposition of an exclusion may result in termination of the provider's agreement in accordance with section 1866(b)(2)(C) of the Act.

§ 402.9 Failure to request a hearing.

(a) If the respondent does not request a hearing within 60 days of receipt of the notice of proposed determination specified in § 402.7, any civil money penalty, assessment, or exclusion becomes final and CMS or OIG may impose the proposed penalty, assessment, or exclusion, or any less severe penalty, assessment, or suspension.

(b) CMS or OIG notifies the respondent by certified mail, return receipt requested, of any penalty, assessment, or exclusion that has been imposed and of the means by which the respondent may satisfy the judgment.

(c) The respondent has no right to appeal a penalty, assessment, or exclusion for which he or she has not requested a hearing.

§ 402.11 Notice to other agencies and other entities.

(a) Whenever a penalty, assessment, or exclusion becomes final, CMS or OIG notifies the following organizations and entities about the action and the reasons for it:

(1) The appropriate State or local medical or professional association.

(2) The appropriate quality improvement organization.

(3) As appropriate, the State agency responsible for the administration of each State health care program (Medicaid, the Maternal and Child Health Services Block Grant Program, and the Social Services Block Grant Program).

(4) The appropriate Medicare carrier or fiscal intermediary.

(5) The appropriate State or local licensing agency or organization (including the Medicare and Medicaid State survey agencies).

(6) The long-term care ombudsman.

(b) For exclusions, CMS or OIG also notifies the public and specifies the effective date.

§ 402.13 Penalty, assessment, and exclusion not exclusive.

Penalties, assessments, and exclusions imposed under this part are in addition to any other penalties prescribed by law.

§ 402.15 Collateral estoppel.

(a) When a final determination that the respondent presented or caused to be presented a claim or request for payment falling within the scope of § 402.1 has been rendered in any proceeding in which the respondent was a party and had an opportunity to be heard, the respondent is bound by that determination in any proceeding under this part.

(b) A person who has been convicted (whether upon a verdict after trial or upon a plea of guilty or *nolo contendere*) of a Federal crime charging fraud or false statements is barred from denying the essential elements of the criminal offense if the proceedings under this part involve the same transactions.

§ 402.17 Settlement.

CMS or OIG has exclusive authority to settle any issues or case, without the consent of the ALJ or the Secretary, at any time before a final decision by the Secretary. Thereafter, the General Counsel has the exclusive authority.

§ 402.19 Hearings and appeals.

The hearings and appeals procedures set forth in part 1005 of chapter V of this title are available to any person that receives an adverse determination under this part. For an appeal of a civil money penalty, assessment, or exclusion imposed under this part, either CMS or OIG may represent the government in the hearing and appeals process.

§ 402.21 Judicial review.

After exhausting all available administrative remedies, a respondent may seek judicial review of a penalty, assessment, or exclusion that has become final. The respondent may seek review

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only with respect to a penalty, assessment, or exclusion with respect to which the respondent filed an exception under § 1005.21(c) of this title unless the court excuses the failure or neglect to urge the exception in accordance with section 1128A(e) of the Act because of extraordinary circumstances.

Subpart B—Civil Money Penalties and Assessments

§ 402.105 Amount of penalty.

(a) *\$2,000.* Except as provided in paragraphs (b) through (h) of this section, CMS or OIG may impose a penalty of not more than \$2,000 as adjusted annually under 45 CFR part 102 for each service, bill, or refusal to issue a timely refund that is subject to a determination under this part and for each incident involving the knowing, willful, and repeated failure of an entity furnishing a service to submit a properly completed claim form or to include on the claim form accurate information regarding the availability of other health insurance benefit plans (§ 402.1(c)(21)).

(b) *\$1,000.* CMS or OIG may impose a penalty of not more than \$1,000 as adjusted annually under 45 CFR part 102 for the following:

(1) Per certificate of medical necessity knowingly and willfully distributed to physicians on or after December 31, 1994 that—

- (i) Contains information concerning the medical condition of the patient; or
- (ii) Fails to include cost information.

(2) Per individual about whom information is requested, for willful or repeated failure of an employer to respond to an intermediary or carrier about coverage of an employee or spouse under the employer's group health plan (§ 402.1(c)(20)).

(c) *\$5,000.* CMS or OIG may impose a penalty of not more than \$5,000 as adjusted annually under 45 CFR part 102 for each violation resulting from the following:

(1) The failure of a Medicare supplemental policy issuer, on a replacement policy, to waive any time periods applicable to pre-existing conditions, waiting periods, elimination periods, or probationary periods that were satis-

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fied under a preceding policy (§ 402.1(c)(29)); and

(2) Any issuer of any Medicare supplemental policy denying a policy, conditioning the issuance or effectiveness of the policy, or discriminating in the pricing of the policy based on health status or other criteria as specified in section 1882(s)(2)(A). (§ 402.1(c)(29)).

(d) *\$10,000.* (1) CMS or OIG may impose a penalty of not more than \$10,000 as adjusted annually under 45 CFR part 102 for each day that reporting entity ownership arrangements is late (§ 402.1(c)(22)).

(2) CMS or OIG may impose a penalty of not more than \$10,000 as adjusted annually under 45 CFR part 102 for the following violations that occur on or after January 1, 1997:

(i) Knowingly and willfully, and on a repeated basis, billing for a clinical diagnostic laboratory test, other than on an assignment-related basis (§ 402.1(c)(1)).

(ii) By any durable medical equipment supplier, knowingly and willfully charging for a covered service that is furnished on a rental basis after the rental payments may no longer be made (except for maintenance and servicing) as provided in section 1834(a)(7)(A) (§ 402.1(c)(4)).

(iii) By any durable medical equipment supplier, knowingly and willfully, in violation of section 1834(a)(18)(A), failing to make a refund to Medicare beneficiaries for a covered service for which payment is precluded due to an unsolicited telephone contact from the supplier (§ 402.1(c)(5)).

(iv) By any nonparticipating physician or supplier, knowingly and willfully charging a Medicare beneficiary more than the limiting charge, as specified in section 1834(b)(5)(B), for radiologist services (§ 402.1(c)(6)).

(v) By any nonparticipating physician or supplier, knowingly and willfully charging a Medicare beneficiary more than the limiting charge, as specified in section 1834(c)(3), for mammography screening (§ 402.1(c)(7)).

(vi) By any supplier of prosthetic devices, orthotics, and prosthetics, knowingly and willfully charging for a covered prosthetic device, orthotic, or prosthetic that is furnished on a rental basis after the rental payment may no

longer be made (except for maintenance and servicing) (§ 401.2(c)(8)).

(vii) By any supplier of durable medical equipment, including a supplier of prosthetic devices, prosthetics, orthotics, or supplies, knowingly and willfully failing to make refunds in a timely manner to Medicare beneficiaries for services billed other than on an assignment-related basis if—

(A) The supplier does not possess a Medicare supplier number;

(B) The service is denied in advance; or

(C) The service is determined not to be medically necessary or reasonable (§ 402.1(c)(10)).

(viii) Knowingly and willfully billing or collecting for any services on other than an assignment-related basis for practitioners specified in section 1842(b)(18)(B) (§ 402.1(c)(11)).

(ix) By any physician, knowingly and willfully presenting, or causing to be presented, a claim or bill for an assistant at cataract surgery performed on or after March 1, 1987 for which payment may not be made because of section 1862(a)(15) (§ 402.1(c)(12)).

(x) By any nonparticipating physician who does not accept payment on an assignment-related basis, knowingly and willfully failing to refund on a timely basis any amounts collected for services that are not reasonable or medically necessary or are of poor quality, in accordance with section 1842(l)(1)(A) (§ 402.1(c)(13)).

(xi) By any nonparticipating physician, who does not accept payment for an elective surgical procedure on an assignment-related basis and whose charge is at least \$500, knowingly and willfully failing to—

(A) Disclose the information required by section 1842(m)(1) concerning charges and coinsurance amounts; and

(B) Refund on a timely basis any amount collected for the procedure in excess of the charges recognized and approved by the Medicare program (§ 402.1(c)(14)).

(xii) By any physician, in repeated cases, knowingly and willfully billing one or more beneficiaries, for purchased diagnostic tests, any amount other than the payment amount specified in section 1842(n)(1)(A) or section 1842(n)(1)(B) (§ 402.1(c)(15)).

(xiii) By any nonparticipating physician, supplier, or other person that furnishes physicians' services and does not accept payment on an assignment-related basis—

(A) Knowingly and willfully billing or collecting in excess of the limiting charge (as defined in section 1843(g)(2)) on a repeated basis; or

(B) Failing to make an adjustment or refund on a timely basis as required by section 1848(g)(1)(A)(iii) or (iv) (§ 402.1(c)(17)).

(xiv) Knowingly and willfully billing for State plan approved physicians' services on other than an assignment-related basis for a Medicare beneficiary who is also eligible for Medicaid (§ 402.1(c)(18)).

(xv) By any supplier of durable medical equipment, including a supplier of prosthetic devices, prosthetics, orthotics, or supplies, knowingly and willfully failing to make refunds in a timely manner to Medicare beneficiaries for services billed on an assignment-related basis if—

(A) The supplier did not possess a Medicare supplier number;

(B) The service is denied in advance; or

(C) The service is determined not to be medically necessary or reasonable (§ 402.1(c)(23)).

(3) CMS or OIG may impose a penalty of not more than \$10,000 as adjusted annually under 45 CFR part 102 for each violation, if a person or entity knowingly and willfully bills or collects for outpatient therapy or comprehensive rehabilitation services other than on an assignment-related basis.

(4) CMS or OIG may impose a penalty of not more than \$10,000 as adjusted annually under 45 CFR part 102 for each violation, if a person or entity knowingly and willfully bills or collects for outpatient ambulance services other than on an assignment-related basis.

(5) CMS or OIG may impose a penalty of not more than \$10,000 as adjusted annually under 45 CFR part 102 for each failure of an applicable manufacturer or an applicable group purchasing organization to report timely, accurately, or completely a payment or other transfer of value or an ownership or investment interest (§ 402.1(c)(34)). The total penalty imposed with respect to

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failures to report in an annual submission of information will not exceed \$150,000 as annually adjusted under 45 CFR part 102.

(e) *\$15,000.* CMS or OIG may impose a penalty of not more than \$15,000 as adjusted annually under 45 CFR part 102 for if the seller of a Medicare supplemental policy is not the issuer, for each violation described in paragraphs (f)(2) and (f)(3) of this section (§ 402.1(c)(25) and (c)(26)).

(f) *\$25,000.* CMS or OIG may impose a penalty of not more than \$25,000 as adjusted annually under 45 CFR part 102 for each of the following violations:

(1) Issuance of a Medicare supplemental policy that has not been approved by an approved State regulatory program or does not meet Federal standards on and after the effective date in section 1882(p)(1)(C) of the Act (§ 402.1(c)(23)).

(2) Sale or issuance after July 30, 1992, of a Medicare supplemental policy that fails to conform with the NAIC or Federal standards established under section 1882(p) of the Act (§ 402.1(c)(25)).

(3) Failure to make the core group of basic benefits available for sale when selling other Medicare supplemental plans with additional benefits (§ 402.1(c)(26)).

(4) Failure to provide, before sale of a Medicare supplemental policy, an outline of coverage describing the benefits provided by the policy (§ 402.1(c)(26)).

(5) Failure of an issuer of a policy to suspend or reinstate a policy, based on the policy holder's request, during entitlement to or upon loss of eligibility for medical assistance (§ 402.1(c)(27)).

(6) Failure to provide refunds or credits for Medicare supplemental policies as required by section 1882(r)(1)(B) (§ 402.1(c)(28)).

(7) By an issuer of a Medicare supplemental policy—

(i) Substantial failure to provide medically necessary services to enrollees seeking the services through the issuer's network of entities;

(ii) Imposition of premiums on enrollees in excess of the premiums approved by the State;

(iii) Action to expel an enrollee for reasons other than nonpayment of premiums; or

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(iv) Failure to provide each enrollee, at the time of enrollment, with the specific information provided in section 1882(t)(1)(E)(i) or failure to obtain a written acknowledgment from the enrollee of receipt of the information (as required by section 1882(t)(1)(E)(ii)) (section 1882(t)(2)).

(g) *\$100.* CMS or OIG may impose a penalty of not more than \$100 as adjusted annually under 45 CFR part 102 for each violation if the person or entity does not furnish an itemized statement to a Medicare beneficiary within 30 days of the beneficiary's request.

(h) *\$100,000.* CMS or OIG may impose a penalty of not more than \$10,000 as adjusted annually under 45 CFR part 102 for each knowing failure of an applicable manufacturer or an applicable group purchasing organization to report timely, accurately or completely a payment or other transfer of value or an ownership or investment interest (§ 402.1(c)(34)). The total penalty imposed with respect to knowing failures to report in an annual submission of information will not exceed \$1,000,000 as annually adjusted under 45 CFR part 102.

[63 FR 68690, Dec. 14, 1998, as amended at 66 FR 49546, Sept. 28, 2001; 72 FR 39752, July 20, 2007; 72 FR 46175, Aug. 17, 2007; 78 FR 9520, Feb. 8, 2013; 81 FR 61561, Sept. 6, 2016]

§ 402.107 Amount of assessment.

A person subject to civil money penalties specified in § 402.1(c) may be subject, in addition, to an assessment. An assessment is a monetary payment in lieu of damages sustained by HHS or a State agency.

(a) The assessment may not be more than twice the amount claimed for each service that was a basis for the civil money penalty, except for the violations specified in paragraph (b) of this section that occur before January 1, 1997.

(b) For the violations specified in this paragraph occurring after January 1, 1997, the assessment may not be more than three times the amount claimed for each service that was the basis for a civil money penalty. The violations are the following:

(1) Knowingly and willfully billing, and on a repeated basis, for a clinical diagnostic laboratory test, other than

on an assignment-related basis (§ 402.1(c)(1)).

(2) By any durable medical equipment supplier, knowingly and willfully charging for a covered service that is furnished on a rental basis after the rental payments may no longer be made (except for maintenance and servicing) as provided in section 1834(a)(7)(A) (§ 402.1(c)(4)).

(3) By any durable medical equipment supplier, knowingly and willfully failing, in violation of section 1834(a)(18)(A), to make a refund to Medicare beneficiaries for a covered service for which payment is precluded due to an unsolicited telephone contact from the supplier (§ 402.1(c)(5)).

(4) By any nonparticipating physician or supplier, knowingly and willfully charging a Medicare beneficiary more than the limiting charge, as specified in section 1834(b)(5)(B), for radiologist services (§ 402.1(c)(6)).

(5) By any nonparticipating physician or supplier, knowingly and willfully charging a Medicare beneficiary more than the limiting charge as specified in section 1834(c)(3), for mammography screening (§ 402.1(c)(7)).

(6) By any supplier of prosthetic devices, orthotics, and prosthetics, knowingly and willfully charging for a covered prosthetic device, orthotic, or prosthetic that is furnished on a rental basis after the rental payment may no longer be made (except for maintenance and servicing) (§ 401.2(c)(8)).

(7) By any supplier of durable medical equipment, including a supplier of prosthetic devices, prosthetics, orthotics, or supplies, knowingly and willfully failing to make refunds in a timely manner to Medicare beneficiaries for services billed other than on an assignment-related basis if—

(i) The supplier does not possess a Medicare supplier number;

(ii) The service is denied in advance; or

(iii) The service is determined not to be medically necessary or reasonable (§ 402.1(c)(10)).

(8) Knowingly and willfully billing or collecting for any services on other than an assignment-related basis for a person or entity specified in sections 1834(k)(6), 1834(l)(6), or 1842(b)(18)(B) (§ 402.1(c)(11), (c)(31), or (c)(32)).

(9) By any physician, knowingly and willfully presenting, or causing to be presented, a claim or bill for an assistant at cataract surgery performed on or after March 1, 1987 for which payment may not be made because of section 1862(a)(15) (§ 402.1(c)(12)).

(10) By any nonparticipating physician who does not accept payment on an assignment-related basis, knowingly and willfully failing to refund on a timely basis any amounts collected for services that are not reasonable or medically necessary or are of poor quality, in accordance with section 1842(l)(1)(A) (§ 402.1(c)(13)).

(11) By any nonparticipating physician, who does not accept payment for an elective surgical procedure on an assignment-related basis and whose charge is at least \$500, knowingly and willfully failing to—

(i) Disclose the information required by section 1842(m)(1) concerning charges and coinsurance amounts; and

(ii) Refund on a timely basis any amount collected for the procedure in excess of the charges recognized and approved by the Medicare program (§ 402.1(c)(14)).

(12) By any physician, in repeated cases, knowingly and willfully billing one or more beneficiaries, for purchased diagnostic tests, any amount other than the payment amount specified in section 1842(n)(1)(A) or section 1842(n)(1)(B) (§ 402.1(c)(15)).

(13) By any nonparticipating physician, supplier, or other person that furnishes physicians' services and does not accept payment on an assignment-related basis—

(i) Knowingly and willfully billing or collecting in excess of the limiting charge (as defined in section 1843(g)(2)) on a repeated basis; or

(ii) Failing to make an adjustment or refund on a timely basis as required by section 1848(g)(1)(A) (iii) or (iv) (§ 402.1(c)(17)).

(14) Knowingly and willfully billing for State plan approved physicians' services on other than an assignment-related basis for a Medicare beneficiary who is also eligible for Medicaid (§ 402.1(c)(18)).

(15) By any supplier of durable medical equipment, including suppliers of prosthetic devices, prosthetics,

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orthotics, or supplies, knowingly and willfully failing to make refunds in a timely manner to Medicare beneficiaries for services billed on an assignment-related basis if—

- (i) The supplier did not possess a Medicare supplier number;
- (ii) The service is denied in advance; or
- (iii) The service is determined not to be medically necessary or reasonable (§ 402.1(c)(23)).

[63 FR 68690, Dec. 14, 1998, as amended at 66 FR 49546, Sept. 28, 2001]

§ 402.109 Statistical sampling.

(a) *Purpose.* CMS or OIG may introduce the results of a statistical sampling study to show the number and amount of claims subject to sanction under this part that the respondent presented or caused to be presented.

(b) *Prima facie evidence.* The results of the statistical sampling study, if based upon an appropriate sampling and computed by valid statistical methods, constitute prima facie evidence of the number and amount of claims or requests for payment subject to sanction under § 402.1.

(c) *Burden of proof.* Once CMS or OIG has made a prima facie case, the burden is on the respondent to produce evidence reasonably calculated to rebut the findings of the statistical sampling study. CMS or OIG then has the opportunity to rebut this evidence.

§ 402.111 Factors considered in determinations regarding the amount of penalties and assessments.

(a) *Basic factors.* In determining the amount of any penalty or assessment, CMS or OIG takes into account the following:

- (1) The nature of the claim, request for payment, or information given and the circumstances under which it was presented or given.
- (2) The degree of culpability, history of prior offenses, and financial condition of the person submitting the claim or request for payment or giving the information.
- (3) The resources available to the person submitting the claim or request for payment or giving the information.
- (4) Such other matters as justice may require.

(b) *Criteria to be considered.* As guidelines for taking into account the factors listed in paragraph (a) of this section, CMS or OIG considers the following circumstances:

(1) *Aggravating circumstances of the incident.* An aggravating circumstance is any of the following:

(i) The services or incidents were of several types, occurring over a lengthy period of time.

(ii) There were many of these services or incidents or the nature and circumstances indicate a pattern of claims or requests for payment for these services or a pattern of incidents.

(iii) The amount claimed or requested for these services was substantial.

(iv) Before the incident or presentation of any claim or request for payment subject to imposition of a civil money penalty, the respondent was held liable for criminal, civil, or administrative sanctions in connection with a program covered by this part or any other public or private program of payment for medical services.

(v) There is proof that a respondent engaged in wrongful conduct, other than the specific conduct upon which liability is based, relating to government programs or in connection with the delivery of a health care service. (The statute of limitations governing civil money penalty proceedings does not apply to proof of other wrongful conduct as an aggravating circumstance.)

(2) *Mitigating circumstances.* The following circumstances are mitigating circumstances:

(i) All the services or incidents subject to a civil money penalty were few in number and of the same type, occurred within a short period of time, and the total amount claimed or requested for the services was less than \$1,000.

(ii) The claim or request for payment for the service was the result of an unintentional and unrecognized error in the process of presenting claims or requesting payment and the respondent took corrective steps promptly after discovering the error.

(iii) Imposition of the penalty or assessment without reduction would

jeopardize the ability of the respondent to continue as a health care provider.

(3) *Other matters as justice may require.* Other circumstances of an aggravating or mitigating nature are taken into account if, in the interests of justice, they require either a reduction of the penalty or assessment or an increase in order to ensure the achievement of the purposes of this part.

(c) *Effect of aggravating or mitigating circumstances.* In determining the amount of the penalty and assessment to be imposed for every service or incident subject to a determination under § 402.1(c)—

(1) If there are substantial or several mitigating circumstances, the aggregate amount of the penalty and assessment is set at an amount sufficiently below the maximum permitted by §§ 402.105(a) and 402.107 to reflect that fact.

(2) If there are substantial or several aggravating circumstances, the aggregate amount of the penalty and assessment is set at an amount at or sufficiently close to the maximum permitted by §§ 402.105(a) and 402.107 to reflect that fact.

(d)(1) The standards set forth in this section are binding, except to the extent that their application would result in imposition of an amount that would exceed limits imposed by the United States Constitution.

(2) The amount imposed is not less than the approximate amount required to fully compensate the United States, or any State, for its damages and costs, tangible and intangible, including but not limited to the costs attributable to the investigation, prosecution, and administrative review of the case.

(3) Nothing in this section limits the authority of CMS or OIG to settle any issue or case as provided by § 402.19 or to compromise any penalty and assessment as provided by § 402.115.

§ 402.113 When a penalty and assessment are collectible.

A civil money penalty and assessment become collectible after the earliest of the following:

(a) Sixty days after the respondent receives CMS's or OIG's notice of proposed determination under § 402.7, if the

respondent has not requested a hearing before an ALJ.

(b) Immediately after the respondent abandons or waives his or her appeal right at any administrative level.

(c) Thirty days after the respondent receives the ALJ's decision imposing a civil money penalty or assessment under § 1005.20(d) of this title, if the respondent has not requested a review before the DAB.

(d) If the DAB grants an extension of the period for requesting the DAB's review, the day after the extension expires if the respondent has not requested the review.

(e) Immediately after the ALJ's decision denying a request for a stay of the effective date under § 1005.22(b) of this title.

(f) If the ALJ grants a stay under § 1005.22(b) of this title, immediately after the judicial ruling is completed.

(g) Sixty days after the respondent receives the DAB's decision imposing a civil money penalty if the respondent has not requested a stay of the decision under § 1005.22(b) of this title.

§ 402.115 Collection of penalty or assessment.

(a) Once a determination by HHS has become final, CMS is responsible for the collection of any penalty or assessment.

(b) The General Counsel may compromise a penalty or assessment imposed under this part, after consultation with CMS or OIG, and the Federal government may recover the penalty or assessment in a civil action brought in the United States district court for the district where the claim was presented or where the respondent resides.

(c) The United States or a State agency may deduct the amount of a penalty and assessment when finally determined, or the amount agreed upon in compromise, from any sum then or later owing to the respondent.

(d) Matters that were raised or that could have been raised in a hearing before an ALJ or in an appeal under section 1128A(e) of the Act may not be raised as a defense in a civil action by the United States to collect a penalty under this part.

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Subpart C—Exclusions

SOURCE: 72 FR 39752, July 20, 2007, unless otherwise noted.

§ 402.200 Basis and purpose.

(a) *Basis.* This subpart is based on the sections of the Act that are specified in § 402.1(e).

(b) *Purpose.* This subpart—

(1) Provides for the imposition of an exclusion from the Medicare and Medicaid programs (and, where applicable, other Federal health care programs) against persons that violate the provisions of the Act provided in § 402.1(e) (and further described in § 402.1(c)); and

(2) Sets forth the appeal rights of persons subject to exclusion and the procedures for reinstatement following exclusion.

§ 402.205 Length of exclusion.

The length of exclusion from participation in Medicare, Medicaid, and, where applicable, other Federal health care programs, is contingent upon the specific violation of the Medicare statute. A full description of the specific violations identified in the sections of the Act are cross-referenced in the regulatory sections listed in the table in paragraph (a) of this section.

(a) In no event will the period of exclusion exceed 5 years for violation of the following sections of the Act:

Social Security Act paragraph	Code of Federal Regulations section
1833(h)(5)(D) in repeated cases	§ 402.1(c)(1)
1833(q)(2)(B) in repeated cases	§ 402.1(c)(3)
1834(a)(11)(A)	§ 402.1(c)(4)
1834(a)(18)(B)	§ 402.1(c)(5)
1834(b)(5)(C)	§ 402.1(c)(6)
1834(c)(4)(C)	§ 402.1(c)(7)
1834(h)(3)	§ 402.1(c)(8)
1834(j)(4)	§ 402.1(c)(10)
1834(k)(6)	§ 402.1(c)(31)
1834(l)(6)	§ 402.1(c)(32)
1842(b)(18)(B)	§ 402.1(c)(11)
1842(k)	§ 402.1(c)(12)
1842(l)(3)	§ 402.1(c)(13)
1842(m)(3)	§ 402.1(c)(14)
1842(n)(3)	§ 402.1(c)(15)
1842(p)(3)(B) in repeated cases	§ 402.1(c)(16)
1848(g)(1)(B) in repeated cases	§ 402.1(c)(17)
1848(g)(3)(B)	§ 402.1(c)(18)
1848(g)(4)(B)(iii) in repeated cases	§ 402.1(c)(19)
1879(h)	§ 402.1(c)(23)

(b) For violation of the following sections, there is no maximum time limit for the period of exclusion.

Social Security Act paragraph	Code of Federal Regulations section
1834(a)(17)(c) for a pattern of contacts.	§ 402.1(e)(2)(i)
1834(h)(3) for a pattern of contacts	§ 402.1(e)(2)(ii)
1877(g)(5)	§ 402.1(c)(22)
1882(a)(2)	§ 402.1(c)(24)
1882(p)(8)	§ 402.1(c)(25)
1882(p)(9)(C)	§ 402.1(c)(26)
1882(q)(5)(C)	§ 402.1(c)(27)
1882(r)(6)(A)	§ 402.1(c)(28)
1882(s)(4)	§ 402.1(c)(29)
1882(t)(2)	§ 402.1(c)(30)

(c) For a person excluded under any of the grounds specified in paragraph (a) of this section, notwithstanding any other requirements in this section, reinstatement occurs—

(1) At the expiration of the period of exclusion, if the exclusion was imposed for a period of 5 years; or

(2) At the expiration of 5 years from the effective date of the exclusion, if the exclusion was imposed for a period of less than 5 years and the initiating agency did not receive the appropriate written request for reinstatement as specified in § 402.300.

§ 402.208 Factors considered in determining whether to exclude, and the length of exclusion.

(a) *General factors.* In determining whether to exclude a person and the length of exclusion, the initiating agency considers the following:

(1) The nature of the claims and the circumstances under which they were presented.

(2) The degree of culpability, the history of prior offenses, and the financial condition of the person presenting the claims.

(3) The total number of acts in which the violation occurred.

(4) The dollar amount at issue (Medicare Trust Fund dollars or beneficiary out-of-pocket expenses).

(5) The prior history of the person insofar as its willingness or refusal to comply with requests to correct said violations.

(6) Any other facts bearing on the nature and seriousness of the person's misconduct.

(7) Any other matters that justice may require.

(b) *Criteria to be considered.* As a guideline for taking into account the general factors listed in paragraph (a)

of this section, the initiating agency may consider any one or more of the circumstances listed in paragraphs (b)(1) and (b)(2) of this section, as applicable. The respondent, in his or her written response to the notice of intent to exclude (that is, the proposed exclusion), may provide information concerning potential mitigating circumstances.

(1) *Aggravating circumstances.* An aggravating circumstance may be any of the following:

(i) The services or incidents were of several types and occurred over an extended period of time.

(ii) There were numerous services or incidents, or the nature and circumstances indicate a pattern of claims or requests for payment or a pattern of incidents, or whether a specific segment of the population was targeted.

(iii) Whether the person was held liable for criminal, civil, or administrative sanctions in connection with a program covered by this part or any other public or private program of payment for health care items or services at any time before the incident or whether the person presented any claim or made any request for payment that included an item or service subject to a determination under § 402.1.

(iv) There is proof that the person engaged in wrongful conduct, other than the specific conduct upon which liability is based, relating to government programs and in connection with the delivery of a health care item or service. The statute of limitations governing civil money penalty proceedings at section 1128A(c)(1) of the Act does not apply to proof of other wrongful conducts as an aggravating circumstance.

(v) The wrongful conduct had an adverse impact on the financial integrity of the Medicare program or its beneficiaries.

(vi) The person was the subject of an adverse action by any other Federal, State, or local government agency or board, and the adverse action is based on the same set of circumstances that serves as a basis for the imposition of the exclusion.

(vii) The noncompliance resulted in a financial loss to the Medicare program of at least \$5,000.

(viii) The number of instances for which full, accurate, and complete disclosure was not made as required, or provided as requested, and the significance of the undisclosed information.

(2) *Mitigating circumstances.* A mitigating circumstance may be any of the following:

(i) All incidents of noncompliance were few in nature and of the same type, occurred within a short period of time, and the total amount claimed or requested for the items or services provided was less than \$1,500.

(ii) The claim(s) or request(s) for payment for the item(s) or service(s) provided by the person were the result of an unintentional and unrecognized error in the person's process for presenting claims or requesting payment, and the person took corrective steps promptly after the error was discovered.

(iii) Previous cooperation with a law enforcement or regulatory entity resulted in convictions, exclusions, investigations, reports for weaknesses, or civil money penalties against other persons.

(iv) Alternative sources of the type of health care items or services furnished by the person are not available to the Medicare population in the person's immediate area.

(v) The person took corrective action promptly upon learning of the noncompliance from the person's employee or contractor, or by the Medicare contractor.

(vi) The person had a documented mental, emotional, or physical condition before or during the commission of the noncompliant act(s) and that condition reduces the person's culpability for the acts in question.

(vii) The completeness and timeliness of refunding to the Medicare Trust Fund or Medicare beneficiaries any inappropriate payments.

(viii) The degree of culpability of the person in failing to provide timely and complete refunds.

(3) *Other matters as justice may require.* Other circumstances of an aggravating or mitigating nature are taken into account if, in the interest of justice,

those circumstances require either a reduction or increase in the sanction to ensure achievement for the purposes of this subpart.

(4) *Initiating agency authority.* Nothing in this section limits the authority of the initiating agency to settle any issue or case as provided by § 402.17, or to compromise any penalty and assessment as provided by § 402.115.

§ 402.209 Scope and effect of exclusion.

(a) *Scope of exclusion.* Under this title, persons may be excluded from the Medicare, Medicaid, and, where applicable, any other Federal health care programs.

(b) *Effect of exclusion on a person(s).*

(1) Unless and until an excluded person is reinstated into the Medicare program, no payment is made by Medicare, Medicaid, and, where applicable, any other Federal health care programs for any item or service furnished by the excluded person or at the direction or request of the excluded person when the person furnishing the item or service knew or had reason to know of the exclusion, on or after the effective date of the exclusion as specified in the notice of exclusion.

(2) An excluded person may not take assignment of a Medicare beneficiary's claim on or after the effective date of the exclusion.

(3) An excluded person that submits, or causes to be submitted, claims for items or services furnished during the exclusion period is subject to civil money penalty liability under section 1128A(a)(1)(D) of the Act, and criminal liability under section 1128B(a)(3) of the Act. In addition, submission of claims, or the causing of claims to be submitted for items or services furnished, ordered, or prescribed, by an excluded person may serve as the basis for denying reinstatement to the Medicare program.

(c) *Exceptions.* (1) If a Medicare beneficiary or other person (including a supplier) submits an otherwise payable claim for items or services furnished by an excluded person, or under the medical direction or on the request of an excluded person after the effective date of the exclusion, CMS pays the first claim submitted by the beneficiary or other person and immediately

notifies the claimant of the exclusion. CMS does not pay a beneficiary or other person (including a supplier) for items or services furnished by, or under, the medical direction of an excluded person more than 15 days after the date on the notice to the beneficiary or other person (including a supplier), or after the effective date of the exclusion, whichever is later.

(2) Notwithstanding the other provisions of this section, payment may be made for certain emergency items or services furnished by an excluded person, or under the medical direction or on the request of an excluded person during the period of exclusion. To be payable, a claim for the emergency items or services must be accompanied by a sworn statement of the person furnishing the items or services, specifying the nature of the emergency and the reason that the items or services were not furnished by a person eligible to furnish or order the items or services. No claim for emergency items or services is payable if those items or services were provided by an excluded person that, through employment, contractual, or under any other arrangement, routinely provides emergency health care items or services.

§ 402.210 Notices.

(a) *Notice of proposed determination to exclude.* When the initiating agency proposes to exclude a person from participation in a Federal health care program in accordance with this part, notice of the proposed determination to exclude must be given in writing, and delivered or sent by certified mail, return receipt requested. The written notice must include, at a minimum—

(1) Reference to the statutory basis for the exclusion.

(2) A description of the claims, requests for payment, or incidents for which the exclusion is proposed.

(3) The reason why those claims, requests for payments, or incidents subject the person to an exclusion.

(4) The length of the proposed exclusion.

(5) A description of the circumstances that were considered when determining the period of exclusion.

(6) Instructions for responding to the notice, including a specific statement

of the person's right to submit documentary evidence and a written response concerning whether the exclusion is warranted, and any related issues such as potential mitigating circumstances. The notice must specify that—

(i) The person has the right to request an opportunity to meet with an official of the initiating agency to make an oral presentation; and

(ii) The request to make an oral presentation must be submitted within 30 days of the receipt of the notice of intent to exclude.

(7) If a person fails, within the time permitted under § 402.212, to exercise the right to respond to the notice of proposed determination to exclude, the initiating agency may initiate actions for the imposition of the exclusion.

(b) *Notice of exclusion.* Once the initiating agency determines that the exclusion is warranted, a written notice of exclusion is sent to the person in the same manner as described in paragraph (a) of this section. The exclusion is effective 20 days from the date of the notice. The written notice must include, at a minimum, the following:

(1) The basis for the exclusion.

(2) The length of the exclusion and, when applicable, the factors considered in setting the length.

(3) The effect of exclusion.

(4) The earliest date on which the initiating agency considers a request for reinstatement.

(5) The requirements and procedures for reinstatement.

(6) The appeal rights available to the excluded person under part 1005 of this title.

(c) *Amendment to the notice of exclusion.* No later than 15 days before the final exhibit exchanges required under § 1005.8 of this title, the initiating agency may amend the notice of exclusion if information becomes available that justifies the imposition of a period of exclusion other than the one proposed in the original written notice.

§ 402.212 Response to notice of proposed determination to exclude.

(a) A person that receives a notice of intent to exclude (that is, the proposed determination) as described in § 402.210, may present to the initiating agency a

written response stating whether the proposed exclusion is warranted, and may present additional supportive documentation. The person must submit this response within 60 days of the receipt of notice. The initiating agency reviews the materials presented and initiates a response to the person regarding the argument presented, and any changes to the determination, if appropriate.

(b) The person is also afforded an opportunity to make an oral presentation to the initiating agency concerning whether the proposed exclusion is warranted and any related matters. The person must submit this request within 30 days of the receipt of notice. Within 15 days of receipt of the person's request, the initiating agency initiates communication with the person to establish a mutually agreed upon time and place for the oral presentation and discussion.

§ 402.214 Appeal of exclusion.

(a) The procedures in part 1005 of this title apply to all appeals of exclusions. References to the Inspector General in that part apply to the initiating agency.

(b) A person excluded under this subpart may file a request for a hearing before an administrative law judge (ALJ) only on the issues of whether—

(1) The basis for the imposition of the exclusion exists; and

(2) The duration of the exclusion is unreasonable.

(c) When the initiating agency imposes an exclusion for a period of 1 year or less, paragraph (b)(2) of this section does not apply.

(d) The excluded person must file a request for a hearing within 60 days from the receipt of notice of exclusion. The effective date of an exclusion is not delayed beyond the date stated in the notice of exclusion simply because a request for a hearing is timely filed (see paragraph (g) of this section).

(e) A timely filed written request for a hearing must include—

(1) A statement as to the specific issues or findings of fact and conclusions of law in the notice of exclusion with which the person disagrees.

(2) Basis for the disagreement.

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(3) The general basis for the defenses that the person intends to assert.

(4) Reasons why the proposed length of exclusion should be modified.

(5) Reasons, if applicable, why the health or safety of Medicare beneficiaries receiving items or services does not warrant the exclusion going into or remaining in effect before the completion of an ALJ proceeding in accordance with part 1005 of this title.

(f) If the excluded person does not file a written request for a hearing as provided in paragraph (d) of this section, the initiating agency notifies the excluded person, by certified mail, return receipt requested, that the exclusion goes into effect or continues in accordance with the notice of exclusion. The excluded person has no right to appeal the exclusion other than as described in this section.

(g) If the excluded person files a written request for a hearing, and asserts in the request that the health or safety of Medicare beneficiaries does not warrant the exclusion going into or remaining in effect before completion of an ALJ hearing, then the initiating agency may make a determination as to whether the exclusion goes into effect or continues pending the outcome of the ALJ hearing.

§ 402.300 Request for reinstatement.

(a) An excluded person may submit a written request for reinstatement to the initiating agency no sooner than 120 days prior to the terminal date of exclusion as specified in the notice of exclusion. The written request for reinstatement must include documentation demonstrating that the person has met the standards set forth in § 402.302. Obtaining or reactivating a Medicare provider number (or equivalent) does not constitute reinstatement.

(b) Upon receipt of a written request for reinstatement, the initiating agency may require the person to furnish additional, specific information, and authorization to obtain information from private health insurers, peer review organizations, and others as necessary to determine whether reinstatement is granted.

(c) Failure to submit a written request for reinstatement or to furnish the required information or authoriza-

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tion results in the continuation of the exclusion, unless the exclusion has been in effect for 5 years. In this case, reinstatement is automatic.

(d) If a period of exclusion is reduced on appeal (regardless of whether further appeal is pending), the excluded person may request and apply for reinstatement within 120 days of the expiration of the reduced exclusion period. A written request for the reinstatement includes the same standards as noted in paragraph (b) of this section.

§ 402.302 Basis for reinstatement.

(a) The initiating agency authorizes reinstatement if it determines that—

(1) The period of exclusion has expired;

(2) There are reasonable assurances that the types of actions that formed the basis for the original exclusion did not recur and will not recur; and

(3) There is no additional basis under title XVIII of the Act that justifies the continuation of the exclusion.

(b) The initiating agency does not authorize reinstatement if it determines that submitting claims or causing claims to be submitted or payments to be made by the Medicare program for items or services furnished, ordered, or prescribed, may serve as a basis for denying reinstatement. This section applies regardless of whether the excluded person has obtained a Medicare provider number (or equivalent), either as an individual or as a member of a group, before being reinstated.

(c) In making a determination regarding reinstatement, the initiating agency considers the following:

(1) Conduct of the excluded person occurring before the date of the notice of the exclusion, if that conduct was not known to the initiating agency at the time of the exclusion;

(2) Conduct of the excluded person after the date of the exclusion;

(3) Whether all fines and all debts due and owing (including overpayments) to any Federal, State, or local government that relate to Medicare, Medicaid, or, where applicable, any Federal, State, or local health care program are paid in full, or satisfactory arrangements are made to fulfill these obligations;

(4) Whether the excluded person complies with, or has made satisfactory arrangements to fulfill, all of the applicable conditions of participation or conditions of coverage under the Medicare statutes and regulations; and

(5) Whether the excluded person has, during the period of exclusion, submitted claims, or caused claims to be submitted or payment to be made by Medicare, Medicaid, and, where applicable, any other Federal health care program, for items or services furnished, ordered, or prescribed, and the conditions under which these actions occurred.

(d) Reinstatement is not effective until the initiating agency grants the request and provides notices under § 402.304. Reinstatement is effective as provided in the notice.

(e) A determination for a denial of reinstatement is not appealable or reviewable except as provided in § 402.306.

(f) An ALJ may not require reinstatement of an excluded person in accordance with this chapter.

§ 402.304 Approval of request for reinstatement.

(a) If the initiating agency grants a request for reinstatement, the initiating agency—

(1) Gives written notice to the excluded person specifying the date of reinstatement; and

(2) Notifies appropriate Federal and State agencies, and, to the extent possible, all others that were originally notified of the exclusion, that the person is reinstated into the Medicare program.

(b) A determination by the initiating agency to reinstate an excluded person has no effect if Medicare, Medicaid, or, where applicable, any other Federal health care program has imposed a longer period of exclusion under its own authorities.

§ 402.306 Denial of request for reinstatement.

(a) If a request for reinstatement is denied, the initiating agency provides written notice to the excluded person. Within 30 days of the date of this notice, the excluded person may submit to the initiating agency:

(1) Documentary evidence and a written argument challenging the reinstatement denial; or

(2) A written request to present written evidence or oral argument to an official of the initiating agency.

(b) If a written request as described in paragraph (a)(2) of this section is received timely by the initiating agency, the initiating agency, within 15 days of receipt of the excluded person's request, initiates communication with the excluded person to establish a time and place for the requested meeting.

(c) After evaluating any additional evidence submitted by the excluded person (or at the end of the 30-day period described in paragraph (a) of this section, if no documentary evidence or written request is submitted), the initiating agency sends written notice to the excluded person either confirming the denial, or approving the reinstatement in the manner set forth in § 402.304. If the initiating agency elects to uphold its denial decision, the written notice also indicates that a subsequent request for reinstatement will not be considered until at least 1 year after the date of the written denial notice.

(d) The decision to deny reinstatement is not subject to administrative review.

§ 402.308 Waivers of exclusions.

(a) *Basis.* Section 1128(c)(3)(B) of the Act specifies that in the case of an exclusion from participation in the Medicare program based upon section 1128(a)(1), (a)(3), or (a)(4) of the Act, the individual may request that CMS present, on his or her behalf, a request to the OIG for a waiver of the exclusion.

(b) *Definitions.* For purposes of this section:

Excluded person has the same meaning as a “person” as defined in § 402.3 who meets for the purposes of this subpart, the definition of the term “exclusion” in § 402.3.

Hardship for purposes of this section means something that negatively affects Medicare beneficiaries and results from the imposition of an exclusion because the excluded person is the sole community physician or sole source of

essential specialized services in the Medicare community.

Sole community physician has the same meaning as that term is defined §1001.2 of this title.

Sole source of essential specialized services in the community has the same meaning as that term defined by the §1001.2 of this title.

(c) *General rule.* If CMS determines that a hardship as defined in paragraph (b)(2) of this section results from exclusion of an affected person from the Medicare program, CMS may consider and may make a request to the Inspector General for waiver of the Medicare exclusion.

(d) *Submission and content of a waiver of exclusion request.* An excluded person must submit a request for waiver of exclusion in writing to CMS that includes the following:

(1) A copy of the exclusion notice from the OIG.

(2) A statement requesting that CMS present a waiver of exclusion request to the OIG on his or her behalf.

(3) A statement that he or she is the sole community physician or sole source of essential specialized services in the community.

(4) Documentation to support the statement in paragraph (d)(3) of this section.

(e) *Processing of waiver of exclusion requests.* CMS processes a request for a waiver of exclusion as follows:

(1) Notifies the submitter that the waiver of exclusion request has been received.

(2) Reviews and validates all submitted documents.

(3) During its analysis, CMS may require additional, specific information, and authorization to obtain information from private health insurers, peer review organizations (including, but not limited to, Quality Improvement Organizations), and others as necessary to determine validity.

(4) Makes a determination regarding whether or not to submit the waiver of exclusion request to the OIG based on review and validation of the submitted documents.

(5) If CMS elects to submit the waiver of exclusion request to the OIG, CMS copies the excluded person on the request.

(6) If CMS denies the request, then CMS notifies the excluded person of the decision and specifies the reason(s) for the decision.

(f) *Administrative or judicial review.* A determination rendered under paragraph (e)(4) of this section is not subject to administrative or judicial review.

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